STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 21, 1999
v	No. 212255 Barry Circuit Court
NORMAN EUGENE GUERIN, Defendant-Appellant.	LC No. 98-000026 FH

Before: Murphy, P.J., and Hood and Neff, JJ.

PER CURIAM.

Defendant Norman Guerin was convicted by a jury of operating a vehicle while under the influence of intoxicating liquor, MCL 257.625; MSA 9.2325, operating a vehicle while his license was suspended, MCL 257.904; MSA 9.2604, and unlawful use of a registration plate, MCL 257.256; MSA 9.1956. Defendant appeals as of right. We affirm.

This case arises from a Barry County traffic stop initiated when Barry County sheriff's deputies observed defendant driving in an erratic manner and driving an automobile with a defective exhaust. Riding as a passenger with defendant was his then girlfriend Diane Marsh. When stopped, defendant immediately told one of the deputies that he knew he was going to jail because his license had been suspended. Defendant also told the deputy that he had been drinking beer that evening. Based on defendant's performance of some sobriety tests, his slurred speech and bloodshot eyes, and the smell of alcohol on his breath, the deputy arrested defendant for operating a vehicle under the influence of alcohol. Defendant was also cited for driving while his license was suspended, driving a car with improper plates, and having no proof of automobile insurance. Marsh was not arrested. With defendant's consent, his blood was drawn when he reached the jail. The subsequent test revealed a blood alcohol level of .17 grams of alcohol per 100 milliliters of blood.

Defendant's then girlfriend Marsh was listed in the prosecution's pretrial statement, but was not endorsed as a witness. Nevertheless, two or three weeks before trial the prosecutor orally notified defense counsel that he would be subpoenaing Marsh. On the Thursday before the start of defendant's Monday trial, the prosecutor informed defense counsel that he would not be calling Marsh. When trial began on the Monday morning, defendant indicated to defense counsel that he wanted Marsh to testify.

Defense counsel was unsuccessful in his attempts to contact Marsh at that time, and before testimony began he informed the court of this situation. Defense counsel indicated that attempts to contact defendant for the five weeks leading up to trial had been unsuccessful. He explained that defendant had informed him for the first time that morning that defendant desired Marsh's testimony. The court indicated that it would proceed with the trial and revisit the issue later in the day.

The prosecution completed its case in the morning and the court told defense counsel that if he could get Marsh to appear she could testify after lunch. Marsh, who's relationship with defendant had broken off a few weeks before trial, refused to appear. Defendant's testimony, therefore, was the only evidence the defense presented. Defendant testified that Marsh had picked up the car from a garage that afternoon in order to test drive it while the two considered buying the car. He testified that on the day he was arrested he was upset, so he had a few drinks before starting work at 3 p.m. and purchased a six-pack of beer after he ended work at 11 p.m. He drank some of the beer after work, but not all six. Defendant denied making any inculpatory statements and denied that he was drunk at the time of the stop. Following closing arguments, the court permitted defense counsel to establish a record regarding the court's denial of a defense motion to adjourn the proceedings in order to subpoena Marsh for the following morning. The court stated that it had denied the motion primarily because of defendant's neglect in contacting his attorney regarding this request. Additionally, the court did not believe Marsh's testimony would be helpful given the recent break-up and the testimony already presented. Defense counsel acknowledged that he did not believe Marsh would be of any help, but stated that given his reliance on the prosecutor's later rescinded oral representation, defendant would be prejudiced by denial of an adjournment.

On appeal defendant first contends that he was prejudiced by the court's refusal to adjourn the trial to secure Marsh's appearance and testimony. Defendant appears to assert that Marsh would have supported his testimony regarding his driving, demeanor, sobriety test performance, and alleged admissions made the evening of the arrest. Alternatively, defendant asserts that if it was not error to deny his motion to adjourn, then defense counsel was ineffective for failing to subpoena Marsh.[1]

This Court reviews the trial court's decisions regarding witness lists, witness endorsement, and trial continuances for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995); *People v Paquette*, 214 Mich App 336, 344; 543 NW2d 342 (1995). In *People v Calhoun*, 178 Mich App 517, 523; 444 NW2d 232 (1989), this Court stated that the purpose of the requirement of the prosecution to list a res gestae witness "is merely to notify the defendant" of the existence and status of a witness to the crime. Because defendant knew of the existence of Marsh, the failure of the prosecutor to endorse her as a witness was harmless error. *Id.* Therefore, unless prejudice to the defendant arose from the absence of Marsh at trial, defendant's convictions should be affirmed. *Id.*

We find that defendant was not prejudiced by Marsh's absence. Neither at trial, nor on appeal, has defendant made an offer of proof as to what she would have testified to. However, even if Marsh had appeared and testified in support of defendant's own testimony regarding whether he appeared to be under the influence, defendant still would have been convicted on the evidence presented. MCL

257.625(1); MSA 9.2325(1) allows conviction where a defendant was driving and *either* of the following applies:

> (a) The person is under the influence of intoxicating liquor, a controlled substance, or a combination of intoxicating liquor and a controlled substance.
>
> (b) *The person has an alcohol content of 0.10 grams or more per 100 milliliters of blood*, per 210 liters of breath, or per 67 milliliters of urine. [Emphasis added.]

The prosecution entered into evidence the results of defendant's blood test, showing that approximately one hour after his arrest his alcohol content was 0.17. Nothing Marsh could have testified to would have refuted this evidence. A claim of ineffective assistance requires a similar showing of prejudice. See *People v Pickens,* 446 Mich 298, 309; 521 NW2d 797 (1994). Therefore, defendant's alternative claim that defense counsel was ineffective because he failed to subpoena Marsh is also without merit.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Janet T. Neff

[1] Defendant's allegations of error are relevant only to his OUIL conviction. Defendant has not contested his convictions for driving with a suspended license and unlawful use of a registration plate.